Supreme Court of the United States.

OCTOBER TERM, 1904.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. GEORGE H. DASHIELL.	No. 212.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The following is a sufficient statement of the pleadings, evidence and proceedings in this case for the purpose of this hearing. A very full statement thereof is found in the opinion of the Circuit Court of Appeals (Tr., p. 105 *et seq.*).

This suit was originally brought in the District Court of Tarrant County, in the State of Texas, and was removed by the defendant into the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth, because the defendant railway company is a corporation under a law of the United States.

Plaintiff, by his next friend, alleged that he sustained injuries on December 24th, 1900, in a rear end collision

between a freight train of which he, plaintiff, was conductor and in charge at the time and a working train of the defendant company, the accident being caused by the negligence of the defendant, its agents and employees; that he was thereby injured in and about his head, eyes, back, sides, arms and shoulders, and in the organs and functions of his brain and nervous system, and as a result thereof the sight of his left eye is impaired and that of his right eye weakened through sympathy, and that he is of unsound mind.

The defendant made a general denial, alleged contributory negligence and pleaded in bar a contract of agreement and release by which defendant claimed to be released from all liability for damages resulting from the accident. The release was attached to and made a part of the answer, and is as follows (Tr., p. 14):

ORIGINAL RELEASE.

FILED MARCH 28TH, 1903.

"Whereas on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas and Pacific Railway Co., as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3:15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to wit:

"Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm and giving me a scalp wound.

"And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter.

"Now, therefore, to that end, and in consideration of thirty and no-100 dollars, to me now here paid in cash by said Texas & Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas & Pacific Railway Company, from and against all claims, demands, damages and liabilities, of any and every

kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way, therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas & Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all promises and agreements respecting or in any wise relating to the subject hereof, are fully expressed herein and no others are made or exist.

Signed in duplicate, this 2d day of February, 1901.

G. H. DASHIELL.

"Witnesses:

J. A. HILLIS.

J. H. YOUNG."

Plaintiff demurred (Tr., p. 8) on three grounds: 1st, that the release on its face shows that Dashiell did not undertake, intend or contract to release defendant from any injuries except "Bruising my body, right leg, right arm and a scalp wound"; 2d, that the general words of the release are limited by the specific recital of injuries contained in its first clause; and 3d, that the release did not acquit defendant of liability for damages for injuries to his skull, brain, head, eyes and mental functions and nervous system, which injuries were not included in said contract of settlement. In his first supplemental petition plaintiff pleaded (Tr., p. 9) that if the Court held against him on the demurrers and if plaintiff did sign the release and if he did continue in the service of the defendant thereafter, yet that he executed the release while *non compos mentis*, and that when he signed the release (if he did sign it) he was mistaken as to the extent, nature and character of his injuries, and at the time when he worked for the railway company after his injury, which was claimed to be a ratification of the release, both he and the defendant and its agents were

mistaken as to the extent, nature and character of the injuries, and did not at those times take their seriousness into account (Tr., p. 11). At the trial plaintiff abandoned all these defenses of incompetency to execute the release because of his being *non compos mentis* and of mistake as to the nature and extent of the injuries he had received, and offered no proof thereon.

It appeared from the evidence that the plaintiff and one Berry were injured December 24, 1900; that plaintiff returned to his work as conductor of one of defendant's freight trains on January 3, 1901; that the release was executed February 2, 1901, *there being no evidence whatever that his mind was then in any way affected or that the release was obtained by fraud or misrepresentation, or that there was any mistake of facts;* that he remained in the employ of the defendant continuously (Tr., p. 67) until March 23, 1901, when he was discharged for intoxication (Tr., pp. 66, 67).

The evidence also shows that Dashiell, on August 3d, 1901, made an application for employment in the Chicago, Rock Island & Pacific Railway, in which he stated in reply to a question as to the cause of his leaving his last situation that he was "Dismissed for violation of the company's rules, T. & P. R. R., Ft. Worth, Texas," (Tr., p. 81), and repeated the statement in his answer to the next question (Tr., p. 82).

Dashiell made a report of the accident (Tr., p. 85), but it bears no date.

It also appears from the evidence that plaintiff was paid by the defendant railway company his wages or salary for the months of December, 1900, and February and March, 1901, the amount for January not having been put in evidence by agreement of counsel (Tr., p. 87).

Nothing appears in the record concerning the release except its introduction in evidence and the trial Judge's ruling thereon (Tr., pp. 76, 77).

There was testimony to the effect that more than a

year after the accident symptoms of mental weakness and nervous excitement appeared (Tr., pp. 25, 26, 32, 35), but the testimony was conflicting as to the fact and as to whether these conditions were the result of the injuries or of excessive indulgence in the use of liquor.

Trial was had before Hon. EDWARD R. MEEK and a jury, and resulted in a verdict for the plaintiff in the sum of $7,500, for which sum judgment was duly entered.

A writ of error was sued out from the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the judgment below February 2, 1904.

The case comes to this Honorable Court by writ of error from said judgment of affirmance.

Assignments of Error.

The following are the assignments of error relied upon:

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in its charge to the jury, wherein the following language was used:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff, you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof; to wit, injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been sustained by him resulting in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

XIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in submitting to the jury the question of injuries to the plaintiff, for the reason that plaintiff was barred from recovery for same by reason of the release made and executed by him, which was introduced in evidence.

XIV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in not telling the jury that under and by virtue of the release executed by the plaintiff that he could not recover.

BRIEF.

I.

The release on its face was intended by the parties to apply not only to injuries then known, but to such as might develop thereafter.

When the Court carefully reads the release involved in this case, we believe it will without hesitation conclude it was by its terms intended to be a final settlement of all claims growing out of the accident to the plaintiff.

Only the necessity of getting it out of the way in order to mulct in damages a railway corporation for

the benefit of an unfortunate employee could suggest the hair-splitting process by which it is sought to render this release ineffective. By a similar process still further actions may hereafter be instituted on the same cause of action for injuries to plaintiff not now known or suspected.

The object of executing the release is stated in the instrument itself to be—

" and whereas it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations, and *avoid all controversy in respect to said matter*," etc.

That the " said matter " refers to the accident and not simply to injuries enumerated is evident from the recital which is in these words :

" Extra East Eng. 189 struck caboose of Extra Engine 255, 2½ miles East of Eastland, bruising my body, right leg and right arm, and giving me a scalp wound."

Properly construed the words " bruising my body, right leg, right arm and giving me a scalp wound," as used in the release, merely identify the accident described in the words preceding, which accident was the *cause of action.* If the release was intended to relate only to the enumerated injuries, why should the words " said matter " instead of " said injuries " be used ? Injuries are not referred to as " a matter." An accident being the cause of action may be so designated.

But the contract proceeds :

" I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas & Pacific Railway Company from and against all claims, demands, damages and liabilities of any and every kind or character whatsoever *for or on account of the injuries and damages* sustained by me *in the manner or upon the occasion* aforesaid and arising or accruing or hereafter arising or accruing in any way therefrom.

Is there here any suspicion of an intent to confine the release to the certain injuries enumerated? Is there anything in this release which tends to show that the releasor did not intend to absolve the railway company from the consequences of the accident to the plaintiff? If so why did he use the words "in the manner or upon the occasion aforesaid" and specify all claims, demands, &c., "arising or accruing or *hereafter* arising or accruing therefrom"?

The record contains no evidence of what occurred at the time the instrument was signed by Dashiell, but it does appear that in a letter written by Dashiell two weeks before he executed the release he knew there might be more serious consequences than he afterwards enumerated. He wrote under date of January 15th, 1901 (Tr., p. 77).

"I am afraid I was hurt worse than I thought at— I am in bad shape yet and don't think I ever will be as good a man as I was before I was hurt, but hope I will get all right, etc."

As this letter was written to the Superintendent of the defendant railway company it appears beyond contradiction that at the time the release was executed both parties to it knew of the possibility of further unfavorable developments. Can it be said that under these circumstances the release referred only to the enumerated injuries when its terms did not expressly and explicitly so recite? It is apparent that plaintiff's present contention is an afterthought. It has been held that a cause of action may be "split" in a settlement for injuries but that in such case the intention must be clear and explicit (*Quebe vs. Gulf, Colorado & Sante Fe R. R. Co., 97 Texas,* , hereinafter particularly referred to).

II.

The construction put upon the release by the learned trial Judge is contrary to law and is error, which works serious injustice and requires a reversal of the judgment.

When the release was offered in evidence by the defendant the trial Judge admitted it and said (Tr., p. 77):

"The release will obtain as to the particular matters or injuries set out specifically in the first part of it. There will be no recovery for any injuries which are specifically set out in the release, because that release has not been set aside. Only those matters, or injuries, will be submitted to the jury which are not incorporated in the release."

To which ruling and action of the Court an exception was immediately taken in open court.

The Court charged the jury as follows (Tr., p. 91):

"On the question of the release of the defendants from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company which has been introduced in evidence is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit, injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him, resulting in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action and the consideration of which will be submitted to you in this charge."

To this charge of the Court the defendant duly excepted (Tr., p. 94). The twelfth, thirteenth and fourteenth assignments of error preserve the exceptions as

to the construction put upon the release by the trial Court for the consideration of this Honorable Court.

At the hearing before the Circuit Court of Appeals, counsel for plaintiff placed much reliance upon remarks made in the decision of *U. P. Railway Company vs. Artist, 60 Fed. Rep., 365; 19 U. S. App., 912*, where SANBORN, Circuit Judge, sitting in the Circuit Court of Appeals said:

"General words alone in a release are taken most strongly against the releasor. But where there is a particular recital followed by general words the latter are qualified by the particular recital."

The facts of that case were that plaintiff, an employee of the railway company, having been injured in an accident was sent to one of the company's hospitals where he was treated and afterwards discharged as cured. About a week later he executed a release for an agreed consideration. Some months thereafter he began to suffer pain in his leg and it was discovered that a careless surgeon or attendant had allowed a piece of drainage tube to remain in the original wound. He brought suit for damages and the railway company pleaded the release. Plaintiff recovered judgment. On appeal the judgment was reversed on the ground that the trial Court should have given instructions asked by the railway company in effect that it could be held liable only for its own negligence in the employment of its physicians and attendants and not for the negligence of such surgeons and attendants. In the case there were two causes of action; one for an accident for which a release had been given, the other for the careless act of the hospital surgeon or attendant which was not known when the release was executed and which was therefore not subject to the release.

The release, after specifying certain injuries, contained the following general clause:

"In consideration of the payment of said sum of money, I, Andrew S. Artist, of Cheyenne, in the County of Laramie, in the State of Wyoming, hereby remise,

release and forever discharge the said company, its operated, leased, controlled and auxiliary lines and companies, of and from all manner of actions, causes of action, suits, debts and sums of money, dues, claims and demands whatsoever, in law or equity, which I have had or now have against said company by reason of any matter, cause or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day."

Judge SANBORN, in *Greene vs. Chicago and N. W. Railroad Company, 92 Fed. Rep., 873, 880 (C. C. A.)*, referring to the Artist release, said:

"This release is not of the character of that quoted in Railway Company vs. Artist, in which it was held that a release of a claim for damage on account of injuries to the person from a collision with a railroad car which was specifically described and also from all manner of actions, causes of action, claims and demands whatsoever 'from the beginning of the world to this day' did not cover a cause of action for malpractice which was unknown to both parties when it was signed."

That it differs radically from the release now at bar is apparent by simple comparison. The Artist release follows the old form intended to dispose of all controversies between the parties, whether founded on the same cause of action or on others, while the release now before the Court, in its general clause, covers only such claims and damages as were sustained by Dashiell "in the manner or upon the occasion aforesaid, whether then arising or thereafter arising or accruing."

As every instrument of the character of the release in this case must be construed with reference to its own terms and recitals, it is obvious that rules of construction which may govern in one case do not apply where the instruments differ materially in form. Thus the rule of construction as stated by Judge SANBORN in the Artist case cannot be invoked in this case because of the utter dissimilarity of the general clauses.

We also contend as a general principle of construction, applicable to all releases, that while mistakes of fact may be sufficient to avoid a release, ignorance of future effects of an injury does not render the instrument inoperative or void.

The ruling or construction which we contend for is very accurately stated by Chief Justice PAXON in the case of *Currier vs. Bilger, 149 Pa. St., 109*, in which the facts are exceedingly simple. Plaintiff's horse was gored by a bull; settlement was made for the injury by receipt as follows: "Received of Jacob Bilger fifteen dollars for damages by bull hooking horse. In full." A week later the horse died and plaintiff sued for its value. Defendant pleaded the receipt in bar.

Chief Justice PAXON said:

"Plaintiff made the mistake of underestimating consequences of the injuries to his horse, and by making settlement with the defendant before they were accurately ascertained. This may be his misfortune, but it is one the law cannot remedy. No one will contend that if he had brought suit for the fifteen dollars and recovered he could have maintained a second suit for the death of the horse. He could not have had two suits for one injury, nor could he have settled with the defendant and sustained a suit to recover additional damages for the same injury. In other words, he cannot first recover damages for the injury and then sustain a suit for the consequences of the injury."

In another Pennsylvania case, *Maud Kane vs. Chester Traction Company, 186 Pa. St., 145*, it was said by *Mitchell*, J. (p. 149–150):

"On the contrary her own testimony shows quite plainly that whatever reluctance she had in accepting the sum offered was due to her desire to get more and her subsequent dissatisfaction arose from her belief that she ought to have got more and that her injuries were greater than she at the time thought. This is no ground for avoiding a settlement" (citing *Seeley vs. Traction Company, 179 Pa. St., 334*).

So, also, it has been held that sickness which comes upon the releasor subsequently, although caused by an

accident must be held to have been in contemplation and included within the terms of the release (*Eckels vs. Union Pacific Railway Company, 7 Utah, 335*).

Where a release was executed upon the belief based on the opinion of a physician employed by both parties that the releasor would not be affected by the injuries more than two or three weeks, when in fact he never entirely recovered from them, it was held that the releasor could not avoid the release (*Nelson vs. Minn. St. Ry. Co., 61 Minn., 167.*

In *Shooks vs. Illinois Central R. R. Co., 155 Fed. Rep., 57*, the facts bear a remarkable resemblance to those in the case at bar, but the case turned upon the issue whether or not the plaintiff was mentally affected at the time he executed the release and also upon the issue whether the injury to plaintiff's brain was in fact in contemplation of the parties and included in the settlement of the case and whether it was one for the jury.

SANBORN, Circuit Judge, in *Chicago & N. W. Ry. Co. vs. Wilcox, 116 Fed. Rep. 913, 917*, clearly and forcibly stated the proposition we contend for as follows:

"It is a mistake as to the existence of a past or present fact material to a contract, and that alone, that will warrant its rescission on the ground of mistake. Conceding, for the moment, that the doctor and the agent told the complainant that there was no doubt that she would be well in a year; that she believed this statement; that she relied upon it, and that she has never recovered,—still these facts do not establish a mistake of fact which will warrant the avoidance of a solemn agreement of settlement. The mistake which they established was a mistake in prophecy, in opinion regarding the happening of a future event on the part of the doctor and the agent, and a mistake in belief as to what the future had in store for her on the part of the complainant. The future duration of the disability, the future effect of the injury, were not matters of fact, but matters of conjecture, of opinion, of belief. * * * Ignorance of the duration of the disability and of the ultimate effects of the injuries always exist where compromises are made before a complete recovery is effected. The cases are doubtless rare where the

duration of the disability corresponds with the prophecy of the physician or with the belief of the parties when settlements are made. But compromises and releases are not voidable on this account, for the reason that the parties to them know the uncertainty of these future events, and, by the very fact of settlement before they develop, agree to take the chances of their effects. Their mistakes relative to the future duration of the disabilities and the future effects of the personal injuries that form the subjects of their contract are mistakes of belief, and not of fact, and form no basis for the avoidance of their contract. Such was the mistake under which the complainant labored. It was a mistake in the opinion of the doctor and in the belief of his patient with reference to unknowable future events. It was not a mistake of a past or a present fact, and it presents no ground for a rescission of this release," citing and quoting from *Kowalke vs. Light Co. (Wis.), 79 N. W., 762, 765*, and *Homuth vs. Railway Co., 129 Mo., 629, 645; 31 S. W., 903.*

SINCE THE JUDGMENT IN THIS CASE WAS AFFIRMED BY THE CIRCUIT COURT OF APPEALS, THE LAW IN THE STATE OF TEXAS, WHERE THE CAUSE OF ACTION IN THIS CASE AROSE, HAS BEEN SETTLED IN OUR FAVOR BY THE SUPREME COURT OF THAT STATE.

The decision was rendered May 26, 1904, and is reported in 10 Texas Court Reporter, 296 (from which the opinion below is copied); 81 S. W., 20; and is to appear in 97 Texas.

For the convenience of the Court, we print the opinion in full.

QUEBE v. GULF, C. & S. F. R. R. Co.

WILLIAMS, Associate Justice.—Quebe, while in the employment of the railroad company, and attempting to stop with a heavy piece of timber an engine tank moving along an inclined track, stumbled over an iron peg driven into a pathway along which he was running, and was struck upon the breast and throat by the end of the timber and fell, his head striking the ground with force. He stopped work for a few days, but, believing that he had received no injuries except those

to his throat and breast, and that they were trifling, and being so told by the surgeon of the company, he reported for re-employment. The company had a rule forbidding the re-employment of any servant who had an unsettled claim for damages against it, and its agents informed Quebe that he could not be employed unless he executed a release. Thereupon, the following instrument was executed:

CONTRACT OF SETTLEMENT.

"Know all men by these presents: That whereas, on the 3d day of May, 1901, I, the undersignd, was in the employ of the Gulf, Colorado and Santo Fe Railway Company, as carpenter, on * * * and, while so employed, received injuries as follows: Throat and breast injured by falling on a peg. And whereas, said company will not employ or retain in its employment anyone who has an unadjusted claim for damages against it, and will not promise employment to or consider anyone as an applicant for employment who has an unadjusted claim against it:

"Now, therefore, for the purpose of fully ending and determining any claim for damages that I may have against said company, and for and in consideration of the sum of $1 to me in hand paid by the said company, the receipt whereof is hereby acknowledged, it being agreed that the execution hereof will be conclusive evidence of the receipt of the same by me, and that I will never claim that the same was not paid to me by said company, and in consideration of the promise of said company to employ me for one day as carpenter at the usual rate of pay, the execution hereof being conclusive evidence that said company has made me such promise, and for such further time and in such capacity as may be satisfactory to the said company, and not longer or otherwise, I do hereby remise, release, and forever discharge said company of and from any and all manner of actions, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I have ever had, or now have, against said company by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort. It being expressly agreed and understood that said company is not bound or obligated by these presents or otherwise (except as to said one day) to retain me in any particular kind of employment, nor for any definite time.

"In testimony whereof, I have hereunto set my hand this 8th day of May, 1901.

"W. S. QUEBE."

Quebe resumed work on the same day, and remained in the service for about four months, when he became blind and quit. The consideration of $1 was also paid to him by the company. In his action, he asserts no claim for the injury to his throat and breast, but claims that his loss of sight was caused by the blow received upon the head in falling. As to this, his contentions are: (1) that the release does not cover that injury; but, if it does (2) that it was executed without consideration; (3) that it was executed under a mistake of fact, and (4) that it was procured by fraud. Besides the questions arising on this release, there were the usual issues as to negligence, contributory negligence, assumption of risk, and proximate cause. Another prominent question was, whether or not plaintiff's loss of sight was caused by his fall, and upon this the evidence was conflicting and uncertain. The judge who tried the case submitted all of these issues, and, with reference to the release, instructed the jury that it precluded the plaintiff from recovering any damages for the injury to his throat and breast, and further as follows: "The question as to whether the plaintiff and the defendant company intended by the execution of said release to include therein injury to plaintiff's eyes is a question of fact for your determination under the terms and language of said release, construed in the light of all the evidence and circumstances in the case. If you believe that, by the terms of said instrument, construed in the light of all the evidence in this case, it was contemplated or intended by the plaintiff and the defendant company at the time of the execution of said release to release the defendant company from all injuries and damages that might result to plaintiff from said accident and injury, including injuries to his eyesight, then, in such case, you will find for the defendant company without further inquiries. On the other hand, if you believe from the evidence and the terms of said release construed in the light of all the evidence in the case that it was not contemplated by the plaintiff and the defendant nor intended by them at the time of the execution of said instrument to release the defendant company from anything except damages on account of the injury which plaintiff then claimed to have received to his

throat and breast, and that it was not intended thereby to release the defendant company from damages on account of other injuries thereby received, on account of injuries to his eyes, such as is claimed in this case, then, and in such case, said instrument would not conclude the plaintiff, and prevent him from a recovery on account of injuries to his sight, provided plaintiff is entitled to recover same under the law as contained in this charge and the evidence admitted before you." A general verdict was returned for defendant.

The leading contention of counsel for plaintiff in error is that the court should not have thus submitted to the jury the question as to the legal effect of the instrument, but should have instructed, as matter of law, that it did not embrace the injuries for which damages are now claimed. This contention raises the question as to the construction of the instrument, simply, and leaves out of view all questions as to want of consideration, mistake and fraud. We agree with the Court of Civil Appeals that, construed by its language alone, the release is sufficiently broad to embrace all damages arising from the accident specified in it, the "falling on a peg." Not only the general language of the concluding clause, but the recital of the object and purpose of the parties plainly lead to this conclusion. The reliance of the counsel in this contention is upon the principle of construction laid down in a vast number of authorities, that, where there is in a release a particular recital of the subject matter or consideration about which the parties are dealing, general language following, which purports to release all claims, is construed to have reference to the particular matter recited, and is confined to that. This is done in order to prevent surprises by which parties, when releasing one cause of action, may be made to appear to have released another. Most of the many well-considered cases in which releases were thus construed, without reference to questions of fraud and mistake, involved transactions in which the instruments showed that the releasor, while treating of one cause of action, used general language which the other party sought to apply to another and distinct cause of action.

In this case there was but one cause of action, to discharge which was the very purpose recited in the paper, and language appropriate to such purpose was used. The language of the release is not restricted to the damage to throat and breast. The

cause of the injury, that which gave rise to the cause of action for all damages resulting, the fall, is also specified, and all cause of action is then released. Properly applied, the rule of construction restricts the general language to that cause of action and would prevent its application to any other. It is doubtless true that a person having such a cause of action may make a settlement for the damages of which he is at the time conscious, reserving his right of action for any that may subsequently accrue (Bliss v. Railway, 160 Mass., 447; Och v. Railway, 31 S. W. Rep., 968), but such a settlement would be much out of the ordinary course of dealing, and is not expressed by language such as that used by these parties. No ordinary release relating to only one cause of action should be construed as splitting it up, unless the purpose is expressed in its language. In the present case, the language is inconsistent with such a purpose. Some countenance is given to the proposed construction of the instrument in question by the language of some opinions. Railway v. Artist, 60 Fed., 365.

We are not inclined to agree with the application of the rule of construction given in that case, but, whether correct or not, it cannot control here. The particular recitals in the instrument there construed of the injuries received were much more specific than those of the one before us. Every instrument must be construed by its own language, and the intention expressed in it must control; and the intention here expressed, to release a cause of action rather than to acknowledge receipt of payment for a part of the damage, can not be mistaken. We repeat that what we have thus far considered is the application of the rule of construction by which the legal meaning of the release is to be ascertained, and not the principles governing in cases where such instruments are sought to be set aside or restricted in their operation on grounds of fraud or mistake. In most of the accident cases cited by plaintiff in error in which relief was given against the general language of releases, they were attacked on the ground of mistake or fraud, and the expressions in the opinions must be understood as applying when such is the question, and not when the interpretation or construction of the language alone is under consideration. Lumley v. Railway, 76 Fed., 72; Blair v. Railway, 1 S. W. Rep., 325.

The two questions are not always kept distinct in the discussion of such cases, as they must be kept

here. They must be kept distinct here because the question of mistake *vel non* was submitted to the jury in a manner most liberal to plaintiff, and no fraud appears in the case. Any theory of mistake must involve the fact that plaintiff, in the release, did not intend to embrace any such damages as those he now claims, and whether he did or not was a question left with the jury. He asserts that the evidence conclusively shows that he did not so intend, because he had no knowledge that such injuries existed, and that such damage would ensue. The answer is that, for him to intend to release all cause of action, for prospective as well as past and present damage, it was not necessary for him to know what the future would bring to pass. It is enough if he made a binding contract by which he took the "chances of future development." Railway v. McCarty, 1 Texas Court Reporter, 401, 94 Texas, 298. As to this, the release and its recitals contained the evidence of his intention. It is not necessary for us to decide whether or not the court properly put this question to the jury; for, under the view taken of the release, its action was favorable to plaintiff, and he can not complain. Upon the subject of fraud, there was nothing to submit, had there been a request for a submission of that question. The statement made by the surgeon as to the character of plaintiff's injuries was only his medical opinion, which accorded with all that was known or believed, and was made with no purpose, so far as appears, to procure a release or other advantage. No circumstance of undue influence or overreaching is shown. So far as appears, plaintiff acted freely and voluntarily in making the settlement. The consideration was a valuable and legal one, though small. Considering the fact that the matter settled was regarded by both parties as involving no large amount, it can not be said that the smallness of the consideration, by itself, furnishes ground for disregarding the release. From the written contract and the verdict of the jury it appears that the plaintiff chose to accept what was offered and release his cause of action, and no ground for relieving him is made to appear.

The judgment should be reversed and the case dismissed.

Respectfully submitted,
JOHN F. DILLON,
DAVID D. DUNCAN,
WINSLOW S. PIERCE,
Counsel for the Railway Company.